United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

[CORRECTED COPY]

76-1595

To be argued by
JOHN S. SIFFERT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1595

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM WESTMORELAND,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

William Westmoreland appeals from a judgment of conviction entered on December 17, 1976 in the United States District Court for the Southern District of New York, following a five day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 76 Cr. 358, filed on April 9, 1976, charged William Westmoreland and Yolanda McLaurin in Count One with bank embezzlement and in Count Two with bank larceny, in violation respectively of Title 18, United States Code, Sections 656 and 2113(c). Each count also charged aiding and abetting, in violation of Title 18, United States Code, Section 2.

Trial as to Westmoreland * commenced on October 26, 1976 and concluded on November 1, 1976, when the jury found Westmoreland guilty on Count Two and acquitted him on Count One.

On December 17, 1976, Judge Motley sentenced Westmoreland to a term of imprisonment of five years, but suspended execution of the sentence and placed Westmoreland on probation for five years, with a special condition of probation that Westmoreland make restitution to the bank.

Statement of Facts

A. The Government's Case

The Government's evidence established that in July, 1974 William Westmoreland, with the aid of his girlfriend, Yolanda McLaurin, possessed a $20,000 check of the Goodwear Dress Company knowing it to have been stolen from the National Bank of North America, and thereafter deposited the check in Westmoreland's own business account, "Westmoreland Domesticare"—an account which existed for the sole purpose of disposing of the proceeds of the stolen check. Westmoreland subsequently spent all of the $20,000 within a five week period.

1. The Relationship between Westmoreland and McLaurin

In October 1973, while working as a store detective, William Westmoreland arrested Yolanda McLaurin for

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* Defendant McLaurin signed a deferred prosecution agreement on July 27, 1976 and testified at Westmoreland's trial as a witness called by the Government.

shoplifting. (Tr. 238).* After the arrest, Westmoreland, in a change of heart, telephoned McLaurin, offered to help, and gave her a $200 check to cover any fine which she might incur.** (Tr. 239, 240). Their relationship soon developed into a romantic one, and between December 1973 and May 1974 the two saw one another three or four times a week, including visits to their respective homes and hotels. (Tr. 239, 241, 244, 245, 304).

In January 1974, McLaurin began working as a mail teller for the Manhattan branch of the National Bank of North America (hereinafter referred to as "NBNA"), a job she obtained with Westmoreland listed as a reference on her application. (Tr. 242).

By May 1974, Westmoreland began to express special interest in McLaurin's new job. He made several inquiries of McLaurin about her duties and eventually Westmoreland asked McLaurin if she could deposit someone else's check into Westmoreland's account. (Tr. 243, 245-246). At the same time Westmoreland told McLaurin of his intention to start a business called "Westmoreland Domesticare," a type of cleaning company, (Tr. 248), and to open a business account at the Far Rockaway branch of the NBNA. (Tr. 248-49). Westmoreland then laid bare the specific point of his questions: he told McLaurin, that he wanted her to steal a check, in the approximate amount of $5,000 or more, and payable either to a company similar in name to Westmoreland Domesticare or to NBNA, and to deposit the check in his account. (Tr. 249-50). Westmoreland promised that if the scheme worked, he would leave New

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* Tr. ...." refers to page references in the trial transcript; "App. Br. ...." refers to appellant's brief; "GX ...." refers to Government Exhibits.

** McLaurin never cashed this check.

York with her. (Tr. 246). Despite McLaurin's initial reluctance to engage in this scheme, Westmoreland persistently telephoned her, asking if she "had found a check yet that could be deposited." * (Tr. 250).

2. The Opening of "Westmoreland Domesticare"

On June 19, 1974, Westmoreland opened the "Westmoreland Domesticare" account at the Far Rockaway Branch of the NBNA. (Tr. 67, GX 12). Catherine Raines, the bank employee who opened this account, told Westmoreland that in order to maintain the business account it would be necessary for him to submit a business certificate within one month. She also told Westmoreland that it would be necessary to maintain a minimum of $500.00 on deposit. (Tr. 73-75).** Raines issued Westmoreland a bank starter's kit, which included a checkbook and deposit slips. (Tr. 466). The deposit slips contained pre-printed account numbers without the customer's name.

3. The Theft of the $20,000 Goodwear-NBNA Check

On July 2, 1974, McLaurin, while working at the bank as a mail teller, received check number 7081 from the Goodwear Dress Ltd. Company in the amount of $20,000 and payable to NBNA. By now won over to Westmoreland's plan, McLaurin placed the check in her pocketbook and took it home. The same evening Mc-

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* At about this same time, Westmoreland had incurred substantial indebtedness: $1,474 owed to the telephone company; $700.00 owed to Bank Americard; $1,770.76 to Mastercharge; $455 owed to his landlord; and, $100 owed to Beneficial Finance—a total of $4,500, nearly the same amount he had asked McLaurin to embezzle. (GX 15, 26, 27, 18, 13, 16).

** Westmoreland's initial deposit was only thirty dollars. (Tr. 75).

Laurin told Westmoreland over the telephone that she had the check. Westmoreland thereafter came over to McLaurin's house and looked at the check. (GX 7; Tr. 251, 252).

Although Westmoreland initially thought that the check was too large to embezzle, he overcame his reservations and decided to convert the check. (Tr. 251). Westmoreland told McLaurin to deposit the check into his Domesticare account and, within a week, delivered to McLaurin a completed deposit slip in the amount of the stolen check. (Tr. 254-57).* McLaurin placed the check in the intra-bank mail at the Manhattan branch where she worked. The check then was delivered to the Far Rockaway Branch where it was deposited and credited to Westmoreland's account. (Tr. 258, 117-118, 125-126).

Within eight days of the deposit of the check Westmoreland began to withdraw the funds. He drew two checks totalling $1350 (GX 10, 11) and thereafter made additional expenditures to cover his outstanding debts and for the purchase of furniture and carpeting. (GX 12-37; Tr. 93, 103).

While Westmoreland was spending the proceeds of the embezzled Goodwear check, he was telling a different tale to McLaurin. He advised her that the check had not cleared (Tr. 262) and, in late July, Westmoreland told McLaurin that the bank must have caught the check because the bank wanted to talk to him about his account. (Tr. 263).**

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* The deposit slip was one of those contained in the starter's kit that Westmoreland had received from Ms. Raines. (GX 8; Tr. 254-56, 472).

** In fact the bank had contacted Westmoreland at this time because he still had not filed the business certificate within one month as required. (Tr. 77; GX 3, 4).

[Footnote continued on following page]

By August 16, 1974 Westmoreland had overdrawn his account, expending $21,350 from the Domesticare account all on personal affairs, with the exception of $56.25 which was paid to Hi Lo Professional Housecleaners. (GX 19, 20). Because of the overdrafts, Raines contacted Westmoreland to cover the debt. (Tr. 79). On August 20, 1974, $1350.00 was deposited to cover the overdrafts. (GX 43). Westmoreland never deposited any other funds into the Domesticare account.*

4. The Overdraft of the Chemical Bank Check—Westmoreland's Subsequent Similar Act

The Government was permitted to prove as a subsequent similar act that on August 30, 1975 Westmoreland deliberately issued a check in the amount of $772.00 to British Airways, drawn on a closed account at the Chemical Bank.

Westmoreland further lied to McLaurin by telling her that the $20,000 check had not appeared in his July statement (Tr. 263), when in fact the July monthly statement reflected both the deposit of $20,000 and the withdrawal of more than $8,000 for Westmoreland's personal use.

* On August 28, 1974, McLaurin told Westmoreland that she had been questioned by bank security personnel concerning her duties. Westmoreland instructed her "to deny knowing him or anything about his account," and if necessary, to point the investigators in the direction of another teller at the Far Rockaway branch. (Tr. 265). On August 29, 1974 McLaurin confronted Westmoreland with the fact that the bank had shown her statements of his account and checks drawn thereon in excess of the $20,000. Westmoreland denied to McLaurin that he had spent the money. (Tr. 266).

Shortly before McLaurin's appearance in a federal grand jury in July 1975 in connection with this case, Westmoreland telephoned McLaurin and said he wanted to see her. Upon McLaurin's refusal, Westmoreland threatened to "fix her little red wagon." (Tr. 269).

On June 14, 1973 Westmoreland opened an account at the Chemical Bank in Lawrence, New York (Tr. 489-493). This account subsequently was closed on November 30, 1973 due to overdrawn checks, after Westmoreland was duly notified. (Tr. 497; GX 53). Nonetheless, on August 30, 1975 Westmoreland drew a check on this closed account in the amount of $772.00 to British Airways (GX 55), which was used to purchase three plane tickets from New York to Bermuda.* (Tr. 503-520, 697).

Defense counsel sought to show that Westmoreland had mistakenly issued this bad check. He suggested that Westmoreland accidently wrote the check on the closed account at the Lawrence branch instead of on his valid account at Chemical's North Bellmore branch.**

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* There was no proof that the tickets were used. (Tr. 503-520, 697).

** On cross-examination of the Chemical witness who testified to the British Airway's check, defense counsel asked:

> "Do you know Mrs. Sciame, whether on August 30, 197[5], which is the date this check is dated, whether at that time Mr. Westmoreland had an active open account at your Bellmore branch? Do you know whether he did.
>
> A. No.
>
> * * * * *
>
> Q. If you were asked . . . could you . . . readily [check whether on August 30, 1975 this defendant had an open account at North Bellmore] in the next 24 hours?
>
> A. Yes."

Defense counsel, in open court, then stated that he was not asking the witness to conduct a search of the North Bellmore branch to locate an account in Westmoreland's name in August 1975, but said in the jury's presence: "[Let] the government ask [for the search] if it likes." (Tr. 502).

In response thereto, the prosecutor stated that the Government was prepared to rest, but, given defense counsel's remarks, desired the opportunity to check on the existence of the claimed other Westmoreland account at the Chemical Bank. Without objection

[Footnote continued on following page]

Joseph Murray of the Chemical Bank testified that Westmoreland did have an account at North Bellmore (with Chemical Bank's predecessor, the Security National Bank) which was opened on June 5, 1973, and closed in February 1974. (GX 56; Tr. 700-701). On cross-examination, Murray testified that he had not searched Chemical's records under the name "Drab", a name which never had been mentioned by anybody to that point. (Tr. 709, 710).*

B. The Defense Case

The defense called Special Agent Michael Shea of the Federal Bureau of Investigation and the defendant William Westmoreland.

Shea testified that in August, 1974, he conducted the investigation into the stolen check upon being contacted by the NBNA. Defense counsel was unable to elicit any

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from defendant, the Government was permitted to rest, subject to reopening its case-in-chief on this matter. (Tr. 521). Thereafter, and before the defense case began, the Government ascertained by phone that Westmoreland did have an account at North Bellmore that was opened on June 5, 1973 and closed in February 1974. When defense counsel refused to stipulate to these dates, the Court, without objection, ruled that the Government would be permitted to reopen its case and call a witness from Chemical Bank at North Bellmore on the following morning. (Tr. 539). The witness testified the next morning, after the first defense witness testified, and after defense counsel—for the first time—objected to this procedure.

* The Court remarked at the side bar that if Westmoreland testified that he did have an account with Drab, then "the Government will have the burden if they want on rebuttal to come back on it. . ." (Tr. 711).

statements contradicting McLaurin's testimony.* Moreover, Shea testified on direct that in his initial interviews with NBNA security officials, Westmoreland gave several false exculpatory statements. On August 29, 1974, Westmoreland told bank officials, in Shea's presence, that he first learned of the $20,000 when he received his monthly statement (Tr. 565).** After Westmoreland was told that the deposit slips would be submitted for handwriting comparison, Westmoreland admitted that part of the writing was his, because his car had been stolen with partially filled-out deposit tickets in the glove compartment. (Tr. 569-70). Finally, Westmoreland told Agent Shea that he had spent the $20,000 after consulting a lawyer and obtaining the latter's consent (Tr. 588).***

Defendant Westmoreland testified, in contradiction of McLaurin, that he did not know the $20,000 deposit into his account involved a stolen check (Tr. 840) and that he had never been McLaurin's lover. (Tr. 778). Westmoreland contradicted Agent Shea, asserting that he never had admitted filling out the $20,000 deposit slip in advance

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* In a move that ultimately backfired, Agent Shea was called by the defense, to attempt to impeach McLaurin by hoping to discover that she had made prior inconsistent statements. The defense apparently also hoped to elicit Westmoreland's prior consistent statements. However, regretably from Westmoreland's viewpoint, Shea also testified to prior inconsistent and false exculpatory statements which Leonard Levy, an NBNA official, corroborated on the rebuttal case.

** This was false because the first monthly statement to include the $20,000 deposit was the July statement mailed to Westmoreland in early August, after Westmoreland already had withdrawn several thousand dollars.

*** Shea also testified that later the same day a bank security officer asked Westmoreland if he had purchased a rug with money from the stolen check and that Westmoreland denied such a purchase. This denial also was false, as evidenced by GX 23, 32 and 48. (Tr. 587).

with his name and address, (Tr. 821), and that on August 29, 1974 he did tell the bank officials that the carpeting in his apartment was purchased with the proceeds of the $20,000 check. (Tr. 835). Westmoreland claimed never to have said that he first learned of the $20,000 deposit from receipt of the deposit ticket. (Tr. 781). Westmoreland also contradicted Raines, who testified that a woman had covered the $1350 overdraft on Westmoreland's behalf, by insisting that he personally covered the overdraft. (Tr. 846-47).

As to the British Airways check, Westmoreland testified that, at the time, he had an open joint checking account with George Drab at the North Bellmore branch of Chemical Bank and mistakenly took a check from the closed Lawrence branch account. (Tr. 715-27).

Finally, Westmoreland asserted that he had withdrawn the $20,000 with the advice of an attorney, Robert Weitz. (Tr. 783-86).

On cross-examination, Westmoreland initially denied recalling receipt of Chemical Bank's letter notifying him that his Lawrence account was closed because of overdrafts. On recross Westmoreland inexplicably did recall receipt of the letter. (Tr. 856, 911; GX 53). Westmoreland admitted that he did not file a business certificate with the bank for the Domesticare account until after 30 days had elapsed. Westmoreland denied having talked to Weitz in a personal meeting about the $20,000 deposit, but claimed to have discussed the matter on the phone. (Tr. 888). Westmoreland admitted that he lied to Agent Shea on August 29, 1974 when he said he had given his sister $12,000 (Tr. 889), but denied saying that he had not purchased the carpets or furniture with proceeds of the stolen check. (Tr. 890).

C. The Government's Rebuttal Case

In rebuttal, the Government called three witnesses.

Robert Weitz, an attorney, testified that Westmoreland's testimony was a "complete fabrication," insofar as Westmoreland asserted that Weitz had first advised him to spend the money and later expressed surprise that he had spent it so fast. (Tr. 921).

Murray recalled as a witness, produced all signature cards in the name "Drab," and testified that neither Westmoreland nor George Drab, jointly or separately, had active checking accounts in August 1975.* (Tr. 947-52; 57, 58, 59, 60).

Levy, the NBNA security guard, corroborated Agent Shea's testimony concerning Westmoreland's statements on August 29, 1974. (Tr. 962-64).

ARGUMENT

POINT I

The District Court Properly Admitted Evidence of Westmoreland's Issuance of the Chemical-British Airways Check As a Similar Act Relevant to Defendant's Intent.

Westmoreland argues that evidence of his deliberate drafting of the August 1975 Chemical check to British Airways—drawn on an account known by him to have been closed—should not have been admitted as a similar

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* Murray testified that he had located a savings account in Westmoreland's name alone but that it was not the type of account which permited checks to be drawn. (Tr. 951-52).

act because the conduct was not sufficiently similar to the offense charged. This argument, which ignores both the substantial probative value of the subsequent act evidence and the clear similarity in conduct to the acts charged in the indictment, is entirely without merit.

Initially, Westmoreland recognizes, as he must, the established broad discretion enjoyed by the trial court to admit evidence of other crimes where relevant for any purpose other than solely to prove criminal character or disposition. *See, e.g., United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (October 5, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3253 (October 5, 1976); *United States* v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Miller*, 478 F.2d 1315 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). He claims, however, that the required similarity between the acts charged and that proved as a subsequent act was not sufficient to warrant admission. Although Westmoreland appears at first blush to concede the relevance of the similar act proof, his argument really is little more than a back-door challenge to the probative value of the subsequent similar act.

Westmoreland was charged with aiding and abetting embezzlement and bank larceny of the $20,000 Goodwear

check, payable to the NBNA. Although the Government's proof of Westmoreland's subsequent constructive possession and knowledge of the check was strong, there was no direct connection between Westmoreland and the initial embezzlement of the check, independent of McLaurin. Not surprisingly, the clear and unavoidable tactic of the defense was to attack McLaurin's credibility and to claim naive and innocent expenditure by Westmoreland of the proceeds of the check. Indeed, in his opening, defense counsel suggested that at the close of the evidence, the jury would find that in July 1974 Westmoreland innocently found himself suddenly enriched by a $20,000 deposit which he freely spent.* In such circumstances evidence that in August 1975 Westmoreland wrote a $772 check to British Airways on an account which he then knew was closed and without funds, plainly was relevant to show the intentional nature of Westmoreland's conduct with respect to the earlier $20,000 check and the absence of mistake in his ready squandering of its proceeds. Admission of similar act proof for such specific purposes is explicitly approved in Fed. R. of Evid. 404.**

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* Under established law, the Government ordinarily is entitled to introduce similar act evidence to demonstrate absence of mistake even in its direct case in order to meet its burden of proof as to each element of the offense charged. *United States* v. *Johnson, supra*, 382 F.2d 280. Clearly, the Government is entitled to prove such similar acts when, as here, the defense already has put the issue of intent before the jury in its opening statement.

** Rule 404 provides:

> "(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident."

Contrary to Westmoreland's assertion, the law in this Circuit does not require an identity of elements between the similar act and the offense charged in order for the conduct to be "similar." *See, e.g., United States* v. *Santiago, supra,* 528 F.2d at 1134; *United States* v. *Leonard, supra,* 524 F.2d at 1091. Rather, it is the similarity of conduct that is the benchmark for admitting proof of prior or subsequent unlawful acts.*

Measured against this standard, far from being dissimilar the subsequent act and the indicted offense here plainly were related and similar conduct. In each situation Westmoreland employed a checking account to make use of funds which did not belong to him. The proceeds of the $20,000 NBNA check, as well as those of the later Chemical check, were used for personal expenditures. In each case the attempt to convert the funds was made through an intermediary party who received Westmoreland's checks. In each case the embezzlement was of funds which properly belonged to a bank with which Westmoreland had an account. Moreover in both the NBNA and Chemical situations Westmoreland made use of an account which, at the corresponding time, served no other legitimate purpose. The only dissimilarity between the two checks was that in the NBNA situation Westmoreland had a partner who assisted with the theft of the funds which belonged to another customer of the bank. However, given the other indicia of common actions, this distinction hardly can be said to have been such a difference as to make the conduct signifi-

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* This Court has never drawn any distinction between prior and subsequent similar acts. *See United States* v. *Super,* 492 F.2d 319, 323 (2d Cir.), *cert. denied,* 419 U.S. 876 (1974); *United States* v. *Nathan,* 476 F.2d 456, 459-60 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973).

cantly dissimilar. Moreover, while the two acts in question were separated by approximately a year, the time difference was not sufficient to lessen the probative value of the subsequent act. *Cf. United States* v. *Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965).*

The question of the similarity of conduct, as with the general question of the admissibility of the subsequent act evidence, was a discretionary one for the trial judge, whose decision will rarely be disturbed on appeal. *United States* v. *Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2071 (2d Cir. Feb. 28, 1977); *United States* v. *Leonard*, *supra*, 524 F.2d at 1092. Judge Motley, after hearing argument on the point, properly weighed the probative value of the evidence against its potential prejudicial effect. In determining the probative value of the similar act evidence, Judge Motley correctly determined that the Chemical transaction was sufficiently similar to the conduct charged and plainly relevant in the context of the Government's other evidence. The trial court's conclusion that the probative value of this evidence was not outweighed by its prejudicial effect was surely not an abuse of Judge Motley's broad discretion. (Tr. 463). Indeed, it is manifest that

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* Indeed, this Court has approved the admission of evidence of other crimes far less similar to those in question here. Thus, for example, in *United States* v. *Leonard*, *supra*, a prosecution for filing false income tax returns, this Court approved the introduction of evidence that the defendant submitted a false affidavit to the Internal Revenue Service which stated that he had no foreign bank accounts. Similarly, in *United States* v. *Kaufman*, 453 F.2d 306 (2d Cir. 1971), the defendant's tax returns, which contained false information, were admitted into evidence as similar acts in a prosecution for filing false affidavits under the Soldiers' and Sailors' Civil Relief Act. See also, *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972).

the potential for impermissible inferences from the similar act evidence here was slight. The Chemical transaction did not involve a substantial amount of money nor was it likely to brand Westmoreland as a "bad" or "criminal" person. Moreover, Westmoreland ultimately placed his innocent explanation of this subsequent transaction before the jury—an explanation which the jury patently rejected.

Finally, even if error was committed in admission of this evidence—and we vigorously contend it was not—the error was surely harmless. Judge Motley gave a proper and complete limiting instruction to the jury which fully protected defendant against any possible undue prejudice. *United States* v. *Cheung Kin Ping*, *supra*, slip op. at 2701. Moreover, the evidence against Westmoreland—which included not only McLaurin, but Westmoreland's own testimony which the jury fairly must have concluded was contradictory and beyond belief—was powerful and plainly demonstrated Westmoreland's guilt.

POINT II

Cross-Examination of Westmoreland Was Not Improper.

Westmoreland argues that the prosecutor's limited inquiry on cross-examination whether defendant had stolen money or customers from Hi Lo Professional Cleaners, was improper and prejudiced the jury's opinion of his character. He claims that the District Court's decision to permit this inquiry was error, first, because there was no factual predicate for the questions and second, because the questions implied misconduct which

did not exist.* (App. Br. 17). This claim is patently wrong.

Proper evaluation of Westmoreland's contention first requires a review of the context in which the cross-examination arose. Westmoreland testified on direct that he had worked as a subcontractor with Hi Lo Professional Home Cleaning Inc. He explained that this legitimate business arrangement necessitated his opening of the Westmoreland Domesticare account at the Far Rockaway Branch of NBNA, the very account in which the stolen check was deposited. (Tr. 758). The Government's contention, on the other hand, was that the Domesticare account was a sham, opened for the purpose of facilitating the deposit of the $20,000 stolen check and the subsequent expenditure of its proceeds. Indeed, the account was opened with only $30, and there was never any legitimate deposit to maintain the minimum $500 balance. Moreover, the proof confirmed that of the $21,350 that passed through this account only two checks, in the total amount of $56.25, pertained to Domesticare's business relationship with Hi Lo.**

Against this background, the prosecutor's inquiry on cross-examination into the nature and extent of Westmoreland's asserted business relationship with Hi Lo plainly was permissible to test the defendant's claimed

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* Westmoreland does not allege that the prosecutor lacked a good faith basis for the disputed inquiry. In fact, the trial record plainly indicates the Government did have a good faith basis. (Tr. 879). Moreover, at the presentence hearing defense counsel correctly noted that it was Mr. Spivack, an official at Hi Lo, who told both the probation officer and Agent Shea that Westmoreland "stole customers and perhaps stole money" while Westmoreland worked "as an independent contractor of sorts." (Transcript of proceedings, December 10, 1976 at 5).

** Furthermore, the required business papers were not filed within 30 days until the bank officials called for them.

reason for opening the Domesticare account, a matter raised by Westmoreland himself. *United States* v. *Glasser*, 443 F.2d 994, 1002 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also*, *United States* v. *Harding*, 432 F.2d 1218, 1220 (9th Cir. 1970); *Burrows* v. *United States*, 371 F.2d 434 (10th Cir. 1967).

Furthermore, under Rule 608(b)(1) of the Federal Rules of Evidence,* it was within the discretion of the district court to allow cross-examination about the alleged instances of Westmoreland's misconduct with Hi Lo, insofar as such matters were probative of his truthfulness. Unquestionably, the misconduct inquired into here —Westmoreland's theft of money from Hi Lo and the abuse of his business relationship with that company to co-opt its customers—were matters which directly reflected upon his honesty and integrity, and thereby on his credibility as a witness. *See* Weinstein's Evidence. § 608[05] at 608-23 (1975); *Cf. Gordon* v. *United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Given the fact that Westmoreland's testimony squarely placed his credibility in issue by contradicting the testimony of virtually every Government witness and that the twelve disputed questions on cross-examination ** had a direct relationship to the issue of the Domes-

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* Rule 608(b)(1) provides:

"Specific instances of the conduct of a witness, for the purpose of attacking or supporing his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness.

** The questions and answers were as follows:

Q. Did I understand your testimony on direct examination correctly that Domesticare is a subsidiary of Hi Lo Corporation?

[Footnote continued on following page]

A. I said that I opened—I was a subcontractor for Hi Lo.

Q. Subcontractor, not a subsidiary?

A. No, I had to open a company myself.

Q. What kind of work did Hi Lo do?

A. Hi Lo was doing janitorial type work and house cleaning work.

Q. Did you do subcontracting work for them as part of Domesticare?

A. Yes, it was a company. I had to form my own company, whatever name I wanted to put it in.

Q. It is a fact, is it not, that you had a route which Hi Lo assigned you to and you performed services for those customers on that route, is that not correct?

A. When I was working directly for Hi Lo, yes.

Q. Isn't it a fact that when you had that route you stole money from Hi Lo?

A. That is incorrect.

* * * * *

Q. Mr. Westmoreland, isn't it a fact that you told Hi Lo that the customers you were servicing had cancelled their contracts but in fact you continued to service them on your own, isn't that a fact?

A. The customers didn't have a contract with Hi Lo. The customers I serviced.

Q. Isn't it a fact you told Hi Lo that the customers you serviced were no longer seeking services and then you continued to service them on your own?

A. That is not correct.

Q. Isn't it a fact that you were fired from Hi Lo because of this kind of activity?

A. I was never hired by Hi Lo. I was a subcontractor, they couldn't fire me.

Q. Isn't it a fact they cancelled any kind of agreement with you because of this kind of misconduct on your part?

A. That's incorrect.

* * * * *

Q. Isn't it a fact that George Drab helped you in this kind of scheme at Hi Lo?

* * * * *

A. I don't know what scheme you are speaking of, because there was no scheme as long as I was subcontracting work from Hi Lo.

[Footnote continued on following page]

ticare account, the trial court's decision to allow such inquiry was not an abuse of its sound discretion to control the bounds of cross-examination. *United States* v. *Glasser*, *supra*. *See also*, *United States* v. *DeMarco*, 488 F.2d 828, 831 n.8 (2d Cir. 1973); *United States* v. *Lewis*, 447 F.2d 134, 139 (2d Cir. 1971); *United States* v. *Evanchich*, 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Dardi*, 330 F.2d 316, 333 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

Westmoreland's claim that he was prejudiced by the suggestion of misconduct that was not in fact true, seeks to stand the reasoning of Rule 608(b)(1) on its head. Westmoreland does not claim that the Government lacked a good faith basis for this cross-examination. He simply contends that given his denial of misconduct, the Government should have been precluded from this inquiry. Westmoreland's position thus requires a rule which would either bar inquiry into misconduct whenever the defendant denies the claim, or else permit a full inquiry before the jury on a collateral factual matter. The former alternative would eat up the rule by exception; the latter plainly is contrary to the clear strictures of the Rule that prohibit the Government from introducing extrinsic proof of the claimed misconduct.* In this case, the last word was left with

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Q. Didn't George Drab help you steal money from Hi Lo?

A. Help me steal money? I didn't handle any money from Hi Lo.

A. Weren't you fired from Hi Lo together?

A. I was never fired because I was never hired.

Q. Wasn't George Drab terminated——

* * * * *

A. I have no knowledge of any business relationship with Hi Lo and Mr. Drab. (Tr. 877-84).

* To the extent that the prosecutor mischaracterized Westmoreland's subcontractor relationship with Hi Lo as a subsidiary relationship, even defense counsel did not correct the problem at the robing room conference. (Tr. 879-80). Westmoreland, in any event, explained the true subcontractor relationship in his answers on cross-examination.

the defendant's emphatic denial of wrongdoing.* And, contrary to Westmoreland's suggestion, Judge Motley expressly cautioned the jury on several occasions that evidence consisted of the *witness*' testimony. (Tr. 36, 1032, 1116, 1118).**

Finally, even if error was committed in allowing this cross-examination, the error was harmless. Westmoreland's credibility was otherwise severely impeached. Indeed, in order to have believed Westmoreland, it would have been necessary for the jury to find that McLaurin lied about the entire scheme; that attorney Weitz lied about the advice he had given to Westmoreland; that both Shea and Levy lied about Westmoreland's prior inconsistent and false exculpatory statements; and that both Raines and Murray, the bank employees, were mistaken in their testimony. In short, Westmoreland contradicted virtually every Government witness in significant areas with a story that simply defied belief. In view of the overwhelming proof of his guilt, Westmoreland's claims of error—either separately or together—do not justify reversal of the conviction.

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* Indeed, as indicated earlier (see *supra* at 17 n. 1) the Government was in a position to prove the misconduct inquired into on cross-examination. However, the Government offered no proof to rebut defendant's denial, and the prosecutor made no reference in his summation to the theft of Hi Lo customers and money, nor did he suggest to the jury that Westmoreland had lied about these matters.

** Moreover, the prosecutor told the jury in his summation that questions were not evidence. (Tr. 1064).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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